

SALT RIVER PROJECT

IBLA 89-344

Decided November 5, 1991

Appeal from a decision of the Area Manager, Lower Gila Resource Area Office, Bureau of Land Management, revising appraisal for right-of-way A-10350.

Affirmed in part; set aside and remanded in part.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rent--Rights-of-Way: Appraisals--Rights-of-Way: Federal Land Policy and Management Act of 1976

Where BLM has granted a power line right-of-way subject to future determination of rental, and BLM later determines a rental on the basis of an erroneous calculation of acreage within the grant, BLM is not precluded from revising the rental on the basis of the correct acreage, and requiring the holder of the right-of-way to pay the revised rental from the date that the right-of-way was first granted.

APPEARANCES: Steve Noggle-Doncaster, Esq., Phoenix, Arizona, for appellant; Fritz L. Goreham, Esq., Office of the Field Solicitor, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Salt River Project has appealed from the March 1, 1989, decision of the Area Manager, Lower Gila Resource Area Office, Bureau of Land Management (BLM), requiring payment of \$33,313 additional rental for the period of July 21, 1980, through July 20, 1987, on the basis of an amended appraisal of right-of-way A-10350. This right-of-way was granted on July 21, 1980, subject to future appraisal. The width of the right-of-way is 200 feet, or 100 feet on each side of the centerline of the transmission line, for all of its length except for a single lot. By letter dated May 14, 1984, BLM notified appellant that the 1-year rental was \$4,801, and billed appellant \$19,204 for the 4 previous years. The worksheets show that in calculating the area of the right-of-way, BLM multiplied its length by 100 feet instead of 200 feet. By letter dated April 30, 1987, BLM notified appellant of this error, determined the proper rental to be \$9,560 per year, and required appellant to pay \$33,607 in back rental. This decision, however,

also calculated a future rental rate set at \$6,937 because some of the land subject to the right-of-way had been conveyed meanwhile to the State of Arizona.

BLM's decision did not indicate that it was subject to appeal, and on May 13, 1987, two agents for appellant visited BLM to discuss the matter. By letter dated May 20, 1987, appellant stated that it had no objections to revised annual rental fee for future years, but objected to the assessment of back rental to July 21, 1980. In a memorandum to the Area Manager dated May 23, 1987, the staff reality specialist stated that appellant's agents had been told that the office would issue a decision appealable to the Interior Board of Land Appeals. On March 1, 1989, BLM issued another decision requiring appellant to pay \$33,313 for the period from July 21, 1980, to July 20, 1987.

The right-of-way provides:

An annual charge for the use and occupancy of public lands under authority of this grant will be determined by the Authorized Officer in accordance with the provisions of 43 CFR 2802.1-7. Charges shall be paid by the Grantee to the Authorized Officer annually or in five-year increments, in advance of the rental period. The rental rate will be established by fair market value appraisal in accordance with 43 CFR 2802.1-7, and will become due and payable upon demand.

In its statement of reasons (SOR), appellant characterizes BLM's decision as a "retroactive application of the revised rental rate" (SOR at 2). Appellant states that at the time the right-of-way was granted Departmental regulation 43 CFR 2802.1-7(e) (1979) provided for the revision of charges for a right-of-way only after 5 years, and that the new rental would only begin with the ensuing charge year. Appellant states that these regulations precluded BLM from revising the rental rate sooner than 5 years after its 1984 assessment. Appellant further notes that 8 days after the issuance of the right-of-way, on July 31, 1980, new regulations became effective which eliminate the restrictions on the imposition of rental rates. See 43 CFR 2803.1-2 (1981). 1/ Appellant feels, however, that it would be improper to give this regulatory change retroactive effect upon its right-of-way.

Appellant's argument that BLM revised the rental rate is incorrect. BLM's 1987 calculation was based on the same rental rates per acre that BLM used in 1984. The difference in the total rental arises from a correction of the acreage subject to the right-of-way, not from a change in the per-acre rate. BLM responds that appellant has had full utilization of the entire width of the right-of-way, 200 feet, and stresses that its 1980 decision was not a "reappraisal" but only a revision of the 1984 appraisal to correctly identify the width that was actually being utilized by appellant.

1/ In the revised regulations, the subject matter of 43 CFR 2802.1-7 was treated in 43 CFR 2803.1-2 (1981).

[1] In Mountain States Telephone & Telegraph Co., 80 IBLA 128 (1984), we held that where BLM grants of right-of-way subject to future appraisal, the collection of a rental deposit at the time of the grant with a later adjustment in the annual rental charges upon receipt of an approved fair market value appraisal is not a prohibited imposition of a retroactive rental. Appellant's right-of-way was granted on July 20, 1980, on similar conditions. Although BLM issued a rental determination in 1984, the first determination of charges for all of the acreage included in the right-of-way granted in 1980 was not made until 1987. Accordingly, BLM properly required appellant to pay back rental on the basis of the corrected acreage.

Both BLM and appellant, however, have overlooked an important fact that may significantly reduce appellant's obligation: the conveyance of a portion of the land covered by the right-of-way to the State of Arizona, effective June 29, 1981. ^{2/} Under the provisions of 43 U.S.C. § 1768 (1988), there are three possibilities raised by this situation: the land may be conveyed subject to the right-of-way, without reservation of right to the United States, or the land covered by the right-of-way may be excluded from the conveyance, or, finally, the United States may reserve the right to enforce provisions of the right-of-way and collect rents. Id. Although BLM in 1987 determined that the new annual rental would be \$6,937, BLM failed to use that amount in calculating the rental accruing after June 29, 1981. Because it is not clear from the case file that BLM retained the right to enforce the terms and conditions of the right-of-way, it is impossible to determine whether BLM should have used the \$6,937 figure in computing past rental subsequent to the clear listing. Thus this case must be remanded to BLM to redetermined the rental in conformity to the nature of the interest reserved, if any, under 43 U.S.C. § 1768 (1988).

Therefore, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside and remanded in part.

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge

^{2/} BLM's 1987 decision indicates that affected lands were clear listed or conveyed to the State of Arizona on that date. See generally Ralph C. Memmott, 88 IBLA 360 (1985); Amoco Minerals Co., 81 IBLA 23 (1984); George Antunovich, 76 IBLA 301, 90 I.D. 464 (1983).

